ARBITRATION ADVISORY

2003-02

THE AMENDMENT OR SUPPLEMENTATION OF ARBITRATION AWARDS
March 27, 2003

Replaces and Supercedes Arbitration Advisory 2000-01

INTRODUCTION

This Arbitration Advisory discusses whether or not an arbitrator has the authority to either amend or supplement a previously served arbitration award under the auspices of the Attorney-Client Mandatory Fee Arbitration Program.[1] This Advisory is applicable both to the State Bar's own program and to local programs, whether or not the arbitrators in those local programs are required to deliver their arbitration awards to the program for subsequent service on the parties or are required to serve their awards directly on the parties.

DISCUSSION

The question arises as to whether or not an arbitrator may amend or supplement a previously submitted or issued award in a mandatory fee arbitration proceeding. Business and Professions Code section 6200 *et seq.* is silent on the issue of amending or supplementing an award. The Business and Professions Code does, however, incorporate the provisions of Code of Civil Procedure section 1280 *et seq.* as they pertain to judicial confirmation, correction, or vacation of an arbitration award. The Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar indicate that, except as those Rules may otherwise provide, Business and Professions Code section 6200 and Code of Civil Procedure section 1280 *et seq.* govern arbitration procedures under the Mandatory Fee Arbitration umbrella.

A Second District Court of Appeal case, not in the fee arbitration area but relating to contractual arbitration, entitled A.M. Classic Construction, Inc. vs. Tri-Build Development

[1]The procedure for "correcting" awards (e.g.mathematical errors, etc.) is governed by CCP §1286.6; see page 3 of this Advisory.

Company (1999) 70 Cal.App.4th 1470, held that an arbitrator was permitted to amend an award to determine an issue the arbitrator had inadvertently neglected to initially decide. The decision does not set forth whether a binding or non-binding award was at issue.

In A.M. Classic Construction, Inc. vs. Tri-Build Development Company, *supra*, a subcontractor initiated an arbitration procedure against a contractor for breach of contract and against a school district based on a stop payment notice claim. The parties had briefed the issue of the stop payment notice claim, it had been argued at the arbitration, and it was part and parcel of the proposed judgments submitted by both sides. After the matter had been submitted and the arbitrator's decision had been issued, the plaintiff's counsel contacted the arbitrator, *ex parte*, and advised him that he had neglected to make any ruling or issue any order concerning the stop payment notice claim. The arbitrator then amended his award and had it re-issued.

Subsequently, the superior court granted the plaintiff's petition to confirm the amended arbitration award. The Court of Appeal, Second Appellate District, affirmed. The Court held that the arbitrator was permitted to amend the award to determine the stop payment notice claim. Further, it held that Code of Civil Procedure section 1286.2 sets forth the exclusive grounds for vacating an arbitration award. The respondent had not demonstrated that the amended award was procured by corruption, fraud, undue means, or misconduct by the arbitrator. The Court held that issuing the amended award was not an action in excess of the arbitrator's powers and did not constitute other conduct contrary to the provisions of Code of Civil Procedure section 1286.2.

The Court was very careful to acknowledge that arbitration awards are subject to very narrow judicial review and, as such, would indulge the arbitration process to give effect to arbitration proceedings. The Court noted that there is nothing in the statutory scheme of Code of Civil Procedure section 1280 *et seq.* that either authorizes or prohibits the amendment of an award. The arbitrator had submitted a declaration in the superior court indicating that he had all the information necessary to resolve the inadvertently omitted issue and did not require any further evidence to be submitted to him.[2] In addition, the record did not demonstrate that the arbitrator considered any information that was gleaned from outside the arbitration proceeding in ruling upon the inadvertently omitted claim. Moreover, the record did not show any improper intent or attempt to influence the arbitrator on the part of opposing counsel.

As a basis for its analysis, the Court analyzed Code of Civil Procedure section 1284 that authorizes an arbitrator, upon written application by a party to the arbitration, to correct the award

[2]California Evidence Code section 703.5 states as follows: "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission of Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with section 3160) of Part 2 of Division 8 of the Family Code." This section seems to run contrary to what occurred in A.M. Classic Construction, Inc. vs. Tri-Build Company,, *supra*. However, it is not mentioned in the opinion.

upon either of the grounds set forth in Code of Civil Procedure section 1286.6, subdivisions (a) and (c). These subdivisions authorize correcting an award where there has been a miscalculation of amounts, an evident mistake in the description of any person, property, or thing referred to in the award, or where there is a defect in the form of the award that does not affect the merits of the controversy. Any such application to correct the award requires notice to the opposing party.

The Court in A.M. Classic noted that amending the award in this case did not fall within these subdivisions. The arbitrator was not "correcting" a miscalculation or description and he was not correcting a defect in its "form". The Court held that the arbitrator was resolving the remainder of the dispute submitted to him. The Court was careful to note that the absence of a statutory provision authorizing the amendment of an award does not deprive the arbitrator of jurisdiction to do so. The Court rejected the defendant's claim that the amendment was prejudicial to it.

The Court then underscored the public policy considerations enunciated in Moncharsh vs. Heily & Blase (1992) 3 Cal.4th 1, which severely limit judicial review of arbitration awards. This limited review is based on the specific intent that there be finality to arbitration awards and vastly limited the circumstances under which these awards could be attacked.

TIME CONSIDERATIONS

Subsequent decisions since A.M. Classic have concerned themselves with the time frame permitted for amending or supplementing an arbitration award. The Court in A.M. Classic did not set forth any time frame or restrictions on amendments or supplementations. In Century City Medical Plaza vs. Sperling, Issacs, & Eisenberg (2001) 86 Cal.App.4th 865, the Second District Court of Appeal followed the decision in A.M. Classic but added an additional condition: Century City determined that an amended or supplemental award must be requested and acted upon within the time frame allowed for the correction of an award by any applicable statute or any controlling rules applicable to the particular arbitration at issue. The Court acknowledged that this was not a condition originally set forth in A.M. Classic, but Century City determined such a condition would necessarily be required. The Court went on to state that an amended or supplemented award should not enjoy "more generous temporal restrictions than those provided for expressly authorized corrections or modifications under CCP Section 1284..." [Century City Medical Plaza, at page 881, footnote 25].

A subsequent case, Delany vs. Dahl (2002) 99 Cal.App.4th 647 issued by the Fourth District Court of Appeal, utilized the same legal analysis set forth in A.M. Classic but held that an arbitrator may amend or supplement an award at any time prior to judicial confirmation of the arbitration award. The Court recognized the decision in Century City, but determined that its time constraints contradict the policies set forth in the Moncharsh decision and subsequent decisions which promote the finality of, and the limited judicial intervention in, the arbitration process. Delany held that it would be a waste of the parties' time and money to artificially set a time frame for amending or supplementing an arbitration award when it is inadvertently incomplete and can be corrected without substantial prejudice to the legitimate interests of a party.

"To deny arbitrators the authority to complete their tasks under such circumstances elevates form over substance" [citing A.M. Classic, *supra*, 70 Cal.App.4th at 1478]. The Court of Appeal therefore concluded that there is no compelling reason to prohibit an amendment or supplementation of a fee arbitration award at any time prior to judicial confirmation of the award.

CONCLUSION

Predicated upon the reasoning and the decision in Delaney, *supra*, which incorporates the findings of the A.M. Classic decision, an arbitrator may amend or supplement an award within the limitations set forth in this advisory and in the relevant case law at any time prior to judicial confirmation. It is recommended, however, that if such an amendment or supplementation is going to be issued, the arbitrator should do so at the earliest possible opportunity so as to alert the parties to the arbitrator's intentions.